

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

TRUE HEALTH CHIROPRACTIC,

No. C-13-02219-JST (DMR)

Plaintiff(s),

**ORDER RE: JOINT DISCOVERY  
LETTERS [DOCKET NOS. 79, 110, 111]**

v.

MCKESSON CORPORATION,

Defendant(s).

This putative class action brought under the Telephone Consumer Protection Act of 1991, as amended by the Junk Fax Prevention Act of 2005, 47 U.S.C. § 227 (“TCPA”), challenges Defendants’ alleged practice of sending unsolicited facsimile advertisements, or so-called “junk faxes.” Before the court are three joint discovery letters. [Docket Nos. 79, 110, 111.] The court held a hearing on these disputes on November 13, 2014. This order summarizes the rulings made during that hearing.

**I. DOCKET NO. 79**

In Docket No. 79, Plaintiffs move to compel Defendants to produce all fax advertisements that did not include an opt-out notice that Defendants sent during the class period.<sup>1</sup>

<sup>1</sup> At the hearing, Plaintiffs’ counsel clarified that Plaintiffs sought only exemplars of each unique ad, not copies of every single ad sent to a recipient.

1 Defendants contend that Plaintiffs' request is overbroad, irrelevant, and unduly burdensome,  
2 because the advertisements are not relevant to the question of class certification and are therefore  
3 outside the scope of precertification discovery. The court notes that the presiding judge in this  
4 matter, the Honorable Jon S. Tigar, has not ruled on whether discovery should be bifurcated between  
5 class certification and merits discovery. As this court noted at the hearing, the line between "class  
6 certification discovery" on the one hand, and "pure merits" discovery on the other, can be difficult to  
7 discern. In any event, the requested discovery is relevant to the class certification issue, specifically  
8 to the issues of typicality and commonality. Furthermore, although Defendants argue that the  
9 production would be burdensome, they fail to articulate the nature and extent of the claimed burden.

10 Accordingly, Plaintiffs' motion to compel is **granted**, and Defendants must produce  
11 exemplars of all unique fax ads without opt-out notices sent by Defendants during the class period.  
12 The production shall not be limited to those ads received by the two named Plaintiffs. However, as  
13 discussed at the hearing, the discovery request propounded by Plaintiffs is too broadly worded, and  
14 could capture documents well beyond the "fax advertisements without opt-out notices" that are the  
15 subject of this case. The parties shall have a detailed and specific meet and confer session so that  
16 they can identify the types of documents that fall within the scope of this case, and those that are  
17 outside that scope. If the parties are unable to reach agreement, they shall file a joint discovery letter  
18 following this court's procedures, *see* Docket No. 102, by **November 20, 2014**.

## 19 II. DOCKET NO. 110

20 In Docket No. 110, Plaintiffs move to compel documents showing that the recipients of fax  
21 advertisements sent by Defendants had given Defendants prior express permission to send those  
22 faxes.

23 Defendants object that Plaintiffs' discovery request seeks confidential and proprietary  
24 customer lists. However, Defendants offer no argument for why the parties' stipulated protective  
25 order, *see* Docket No. 57, would be inadequate to protect their confidential information; indeed, the  
26 court finds that the parties' protective order offers sufficient protection to meet Defendants' concern.

27 Defendants also argue that the requested documents are not relevant to the issue of class  
28 certification. Plaintiffs contend, and the court agrees, that evidence that sheds light on the question

1 of whether the permission defense is an individualized inquiry or a generalized argument is relevant  
2 to the class certification issues of typicality, commonality and predominance.

3 Thus, the court **grants** Plaintiffs' motion to compel Defendants to produce documents  
4 relating to the permission defense. However, the court echoes Defendants' concern that Plaintiffs'  
5 request as currently written will be burdensome. Accordingly, the parties shall meet and confer  
6 regarding a more efficient way for Plaintiffs to discover information about Defendants' permission  
7 defense. For example, if Defendants contend that a customer's software registration constitutes that  
8 customer's express permission to receive fax ads, Defendants could produce an example of one  
9 customer's software registration, and explain in an interrogatory response which recipients allegedly  
10 granted Defendants permission to send fax ads by completing similar software registrations. If the  
11 parties cannot agree on a more streamlined way for Defendants to produce the discovery sought by  
12 Plaintiff without judicial intervention, they shall file a joint discovery letter on the dispute by  
13 **November 20, 2014.**

### 14 **III. DOCKET NO. 111**

15 In Docket No. 111, Plaintiffs move to compel the production of documents containing  
16 information about recipients of the fax ads sent by Defendants during the class period, including  
17 their identities and fax numbers, and the dates and times they received transmissions.<sup>2</sup> As discussed  
18 at the hearing, the court finds this information to be relevant to class certification issues, and further  
19 finds that Defendants' concerns about the recipients' confidential information are adequately  
20 addressed by the parties' protective order. Accordingly, Plaintiffs' motion to compel is **granted**.  
21 The universe of recipients shall be bounded by the group of "fax advertisements" identified through  
22 the parties' meet and confer process outlined above regarding the ruling on Docket No. 79.

23 IT IS SO ORDERED.

24 Dated: November 14, 2014

  
\_\_\_\_\_  
DONNA M. RYU  
United States Magistrate Judge

26 \_\_\_\_\_  
27 <sup>2</sup> Another group of discovery requests discussed in Docket No. 111 seeks information about the  
28 equipment used by Defendants to send the fax ads. At the hearing, Plaintiffs' counsel stated that if  
Defendants produced the other discovery requested in Docket No. 111, Plaintiffs would withdraw its  
motion to compel Defendants to produce this discovery.